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No. 93-817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MOTION FILED JAN 4 P.M.

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. KEVIN G. KELLY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR HUGHES AIRCRAFT COMPANY AND LOCKHEED CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Hughes Aircraft Company and Lockheed Corporation hereby respectfully move for leave to file the attached brief as amici curiae in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to consent.

The question in this case is the constitutionality of the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3730(b)-(g), which allow private parties to sue government contractors in the name of the United States for alleged fraud committed against the United States. Hughes Aircraft Company and Lockheed Corporation are major domestic corporations that do a substantial amount of business pursuant to contracts with the United States gov-

ernment. Hughes and Lockheed have each been the target of unmeritorious *qui tam* suits brought by private plaintiffs and are likely to be subjected to more such suits in the future.

Qui tam suits severely prejudice companies like Hughes and Lockheed even if ultimately dismissed for lack of merit. The adverse publicity and interference with an ongoing contractual relationship that attends the institution of the lawsuit is not wiped away when the suit is dismissed months or years later. The constitutional separation of powers structure that places the responsibility for law enforcement with Executive Branch officials sworn to do justice and uphold the public interest, rather than with private individuals motivated solely by the prospect of damage awards, is designed to shield the public from the adverse consequences of such meritless lawsuits. Accordingly, Hughes and Lockheed have a strong interest in having these constitutional safeguards apply to the False Claims Act, and we believe the Court would benefit from their views on the question presented here.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT UNCONSTITUTIONALLY ENCROACH ON THE AUTHORITY AND DISCRETION OF THE EXECUTIVE BRANCH	5
A. The *Qui Tam* Provisions Violate the Constitutional Separation of Powers Structure	5
B. The *Qui Tam* Provisions Violate the Appointments Clause	12
II. THE COURT SHOULD GRANT CERTIORARI NOW TO RESOLVE THE UNCERTAINTY OVER THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Berger v. United States, 295 U.S. 78 (1935) 16
Buckley v. Valeo, 424 U.S. 1 (1976) 4, 5, 12, 13
Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 10
Freytag v. Commissioner, 111 S. Ct. 2631 (1991) .. 14
Gravitt v. General Electric Co., 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988) 9
Heckler v. Chaney, 470 U.S. 821 (1985) 5, 6
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 17
Maryland v. United States, 460 U.S. 1001 (1983) .. 10
Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991) 5, 16, 18
Morrison v. Olson, 487 U.S. 654 (1988) 7, 8, 10
Springer v. Philippine Islands, 277 U.S. 189 (1928) 5
United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) 11
United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993) 6, 7
Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787 (1987) 16, 17

CONSTITUTION, STATUTES, AND REGULATION

26 U.S.C. § 7623 6
False Claims Act, 31 U.S.C. §§ 3729-3733 ..... *passim*
31 U.S.C. § 3730(a) 2
31 U.S.C. § 3730(b) 1, 3
31 U.S.C. § 3730(b)-(g) 3
31 U.S.C. § 3730(c)(2)(A) 8
31 U.S.C. § 3730(c)(2)(B) 8
U.S. Const. art. II, § 2, cl. 2 ..... 4, 12
U.S. Const. art. II, § 3 ..... 3, 5
Treas. Reg. § 301.7623-1 6

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS — Page

131 Cong. Rec. 22,322 (1985) (Statement of Sen. Grassley) 12

132 Cong. Rec. 22,339 (1986) (Statement of Rep. Berman) 12

139 Cong. Rec. S875 (daily ed. Jan. 28, 1993) (Statement of Sen. Grassley) 15

False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 102d Cong., 2d Sess. (1992) (Statement of Stuart M. Gerson) 15

S. Rep. No. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ..... 9, 12

MISCELLANEOUS

13 Op. Off. Legal Counsel 249, 1989 OLC LEXIS 25 (July 18, 1989) 3

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BRIEF FOR HUGHES AIRCRAFT COMPANY AND LOCKHEED CORPORATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Hughes Aircraft Company and Lockheed Corporation are major domestic corporations that do a substantial amount of business pursuant to contracts with the United States government. Each has been the subject of *qui tam* suits brought under Section 3730(b) of the False Claims Act by private individuals in the name of the United States, in which the government has investigated the allegations and declined to join the suit. Some of these suits have been dismissed, but others are still pending. As the volume of *qui tam* suits continues to rise each year, it is likely that Hughes and Lockheed will be the

target of new suits in which private individuals seek to obtain windfall recoveries.

Even when the government declines to join such *qui tam* actions because they lack merit, the suits substantially prejudice companies like Hughes and Lockheed. Companies named in these actions suffer public dishonor through the accusation, in the name of the United States, that they have committed fraud against the government. The effects of that kind of stigmatization are not undone when the *qui tam* relator's claim is dismissed as unfounded—an event that may occur years later and never attracts the splash of publicity that attends the commencement of such a suit. In addition, the defendants must allocate large amounts of scarce resources to respond to what typically are extremely broad discovery requests and onerous litigation demands.

In the absence of the *qui tam* provisions, companies would have to endure these burdens only if a prosecutor acting in the public interest concluded that a suit by the United States was warranted. Under the current system, however, companies are exposed to these burdens at the whim of any private citizen acting from the motivation of personal enrichment. Accordingly, Hughes and Lockheed have a strong interest in the question of the constitutionality of the *qui tam* provisions of the False Claims Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The False Claims Act, 31 U.S.C. §§ 3729-3733, is the primary civil enforcement weapon of the United States against fraud and false claims, providing for the recovery by the government of treble damages and civil penalties. Section 3730(a) requires the Attorney General "diligently [to] investigate a violation" of the Act and further provides that the Attorney General "may bring a civil action" against a person found to have committed a violation. That provision for enforcement

by the Attorney General, of course, fully accords with our constitutional structure and is not the subject of this case.

In 1986, however, Congress greatly expanded the availability of Sections 3730(b)-(g) of the Act, known as the *qui tam* provisions, which raise serious constitutional problems. Indeed, the Department of Justice's Office of Legal Counsel advised the Attorney General in 1989 that these provisions are "patently unconstitutional," dismissing the issue presented here as "not even a close question." 13 Op. Off. Legal Counsel 249, 1989 OLC LEXIS 25, *6 (July 18, 1989). Section 3730(b) allows any person to "bring a civil action for a violation of [the Act] for the person and for the United States government . . . in the name of the Government." Even if the United States decides to intervene in such a suit to litigate what is undeniably a government claim, the plaintiff, or *qui tam* relator, continues to participate in the litigation as a party and pockets a substantial percentage of any recovery.

B. The *qui tam* provisions of the False Claims Act represent a deliberate and significant incursion into the most elemental prerogatives of the Executive Branch. They strip the Executive of the ability to make the fundamental decision whether to try to vindicate the interests of the United States by commencing a lawsuit. Instead, Congress has delegated full authority to make that decision to private individuals, who have no connection whatsoever to the government and whose interests often diverge from those of the United States. And once a private party commences such a suit, almost invariably without the knowledge of government officials, the power of the Executive to control that litigation is severely curtailed.

The ultimate effect of the *qui tam* provisions is to divest the Executive Branch of much of its core power to "take care that the Laws be faithfully executed." Art. II, § 3. That is no accident; in 1986 Congress decided to encourage *qui tam* actions because of its expressed

dissatisfaction with the way in which the Executive had been enforcing the False Claims Act. The *qui tam* provisions are thus a purposeful effort by Congress to reassign the President's authority for enforcing the False Claims Act to the public at large and to replace the Department of Justice with private bounty hunters as the government's principal attorneys in fraud cases. This encroachment by Congress on the prerogatives of the Executive cannot withstand constitutional scrutiny.

By deliberately assigning significant enforcement authority to private citizens, Congress violated not only the basic constitutional separation of powers structure but also the specific injunction of the Appointments Clause, art. II, § 2, cl. 2. The *qui tam* relator is representing the interests of the United States in civil enforcement litigation; he has suffered no personal injury that could give him standing to sue in his own right. Therefore, he is performing the duties of an "Officer of the United States" —a position that constitutionally can be held only by an Executive Branch appointee. *See Buckley v. Valeo,* 424 U.S. 1, 140 (1976).

C. It is imperative that this Court act expeditiously to resolve the constitutional problems raised by the *qui tam* provisions. Those provisions unjustifiably harm private defendants as well as undermine the United States' dominion over its own litigation and government programs. *Qui tam* suits subject the accused to litigation burdens, inaccurate but damaging adverse publicity, disruption of their government contracts, and other adverse consequences that are not relieved when the suit is dismissed as unmeritorious. The Constitution affords potential defendants protection against these adverse effects by guaranteeing that the decision to bring suit will be made by an Executive Branch official bound to act in the interests of justice, not by a private party motivated solely by the prospect of economic gain. With the number of meritless *qui tam* suits increasing each year, the Court should act promptly to define the limits of congressional authority

and to restore the protection afforded by the constitutional separation of powers structure.

ARGUMENT

I. THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT UNCONSTITUTIONALLY ENCROACH ON THE AUTHORITY AND DISCRETION OF THE EXECUTIVE BRANCH

A. The *Qui Tam* Provisions Violate the Constitutional Separation of Powers Structure

1. It is beyond dispute that the separation of powers among the three branches lies at the heart of "[t]he structure of our Government as conceived by the Framers of our Constitution." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2310 (1991). At the core of the Executive power is the responsibility to "take care that the Laws be faithfully executed." Art. II, § 3. "Legislative power, as distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement.* The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). This irrefutable principle places the conduct of the government's litigation squarely within the Executive's authority. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

The *qui tam* provisions impermissibly divest the Executive of the most fundamental component of law enforcement authority—the decision whether to initiate a lawsuit in the first place. A prosecutor's decision to indict "has long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The same is true in the civil enforcement

context, where this Court has noted that whether an administrative agency will enforce the law in a particular instance "is a decision generally committed to an agency's absolute discretion." *Id.* at 831.

Prosecutorial discretion is a critical government function because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* In the False Claims Act setting, for example, the government may decide that other available civil, criminal, administrative, or contractual sanctions are a more appropriate means of resolving a perceived problem. It may determine that national security or other interests preclude a public airing and trial of the matter. It may conclude that a False Claims Act suit would interfere with performance of the contract or cause an unacceptable delay in delivery of critical supplies. Or the Executive may properly conclude that the allegations lack sufficient merit to make it appropriate for the United States to accuse the defendant of fraud.

The balancing of these and other considerations and the initial decision to sue are the Executive's constitutional responsibility; Congress is not free to delegate to the general public the decision to initiate an enforcement action. Nor is there any sound policy reason to do so. If Congress believes that providing a financial incentive to private citizens would enhance the Executive's enforcement efforts, it can follow the model of the Internal Revenue Code and establish rewards for information concerning False Claims Act violations—without divesting the Executive of its prosecutorial discretion. *See* 26 U.S.C. § 7623; Treas. Reg. § 301.7623-1.[1]

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[1] A good example of the way that *qui tam* destroys the Executive's ability to further the public interest through its exercise of prosecutorial discretion is *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993). The *qui tam* relator (a law firm) claimed that a contractor

Even in those cases in which the Executive believes litigation is appropriate, the *qui tam* provisions improperly constrain its right to direct the litigation on behalf of the United States. If the government intervenes in a case, the *qui tam* relator remains a party—free to pursue the litigation in parallel with the Department of Justice in a manner that may be inconsistent with the positions and interests of the Executive. This supposed "representative" of the government often acts as an adversary of the Executive Branch's duly appointed officials.

2. The *qui tam* provisions interfere with the Executive's prerogatives to a significantly greater extent than does the independent counsel statute upheld by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988). The Court there concluded that several features of the statute "give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. Those features relied upon by the Court as conferring Executive control over the independent counsel, however, are notably absent from the *qui tam* provisions of the False Claims Act.

The Court emphasized that the independent counsel statute "gives the Executive a degree of control over the power to initiate an investigation" because an independent counsel may be appointed only pursuant to a specific request by the Attorney General—a decision that "is committed to his unreviewable discretion." *Id.* This is precisely where the government has *no* control over a

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had committed fraud in supplying helicopters that did not comply with contract specifications. In fact, "senior Army officials responsible for the Black Hawk program were aware of this problem," but the contracting parties were working towards an engineering solution without litigation. *Id.* at 204. To the relator, however, the needs of the Army, the timely delivery of essential equipment, the commitments of senior Army officials, and the extent to which litigation would disrupt the contracting process were irrelevant; its interest lay solely in the potential windfall recovery.

qui tam suit. The relator is not required to obtain the Executive's approval, or even to notify the Executive, before filing suit. Similarly, there are no analogous provisions in the False Claims Act for the other attributes of control identified in *Morrison*—the power to remove the independent counsel for good cause, the statutory requirement that the independent counsel comply with Department of Justice policies, and the Attorney General's power at the outset to circumscribe the independent counsel's jurisdiction. *See id.*

The court of appeals acknowledged that, "[c]learly, the government has greater authority to prevent the initiation of prosecution by an independent counsel than by a qui tam relator." Pet. App. 22a. But the court nonetheless concluded that "the Executive Branch exercises at least an equivalent amount of control over *qui tam* relators as it does over independent counsels." *Id.* at 23a. That conclusion rests almost entirely on the court's assertion that "because the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start." *Id.* at 22a. Both the premise and the conclusion of that assertion are seriously in error.

In fact, the False Claims Act does not give the Executive Branch the power to end *qui tam* litigation. The court of appeals apparently was relying on Section 3730 (c)(2)(A), which provides that, if the government decides to intervene in the *qui tam* action, it "may dismiss the action notwithstanding the objections of the" *qui tam* relator, *but only after "the court has provided the person with an opportunity for a hearing on the motion"* (emphasis added). If it wants to dismiss its own claim, just as if it wants to settle (§ 3730(c)(2)(B)), the government is at the mercy of court approval.

Thus, the Executive's ability to terminate litigation that disserves the interests of the United States is not merely

"somewhat qualified," as the court of appeals would have it (Pet. App. 22a); rather, it is constrained by an unbridled veto power of the trial court that is a significant intrusion into the Executive's constitutional sphere of authority. As the court of appeals' opinion recognized (Pet. App. 21a n.11), when the Executive seeks to dismiss a claim, Congress contemplated not only an argument before the judge but also, in some instances, an *evidentiary* hearing. The purpose of these hearings is to allow the *court*—not the Executive—to determine whether the government has "fully investigated the allegations" or whether dismissal is appropriate in light of the existing evidence. *Id.*, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The degree to which this judicial veto power interferes with the Executive's authority is illustrated by *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988). A private citizen commenced a *qui tam* suit on behalf of the United States against General Electric; the Department of Justice entered the suit and negotiated a settlement. The question of court approval was referred to a magistrate who took almost two years to recommend approval. The district court then held two days of evidentiary hearings and decided to reject the settlement and set the case for trial. The court acknowledged that it had not "determine[d] that there was in fact fraudulent conduct in this case," but it pointed out that there had been other instances of fraud with other manufacturers, "such as 'a $500.00 hammer.'" 680 F. Supp. at 1164. Noting that the relator did not appear to be paranoid and that "even more important his counsel is a highly respected and exceedingly competent member of the bar," the court concluded that the government had not sufficiently investigated the allegations to ensure the adequacy of the proposed settlement. *Id.* at 1164-65. The False Claims Act leaves the Executive powerless to resist

this type of judicial intrusion into its law enforcement activities, no matter how irrational, and therefore it plainly does not give the Executive the "power . . . to end qui tam litigation." Pet. App. 22a.[2]

In any event, even if the Executive had more power to terminate *qui tam* litigation, that would not render insignificant the Executive's complete lack of control over its initiation. As we have noted (page 6 *supra*), the Executive may deem litigation undesirable because accusations of fraud (particularly unfounded ones) can seriously damage an important contractual relationship and interfere with elements of performance that are critical to the Nation's well-being. Dismissal of the litigation months, or even years, later cannot undo this damage. And by that time it will likely be too late for the Executive to pursue other forms of redress that it might have preferred initially. Thus, the court of appeals is simply mistaken in concluding that the *qui tam* provisions interfere with the Executive's law enforcement responsibilities to a lesser extent than does the independent counsel statute upheld in *Morrison*.

3. The separation of powers problems inherent in the *qui tam* provisions are exacerbated by the extent to which they disrupt ongoing contracts. As a practical matter, *qui tam* actions impermissibly interfere not only with the Executive's exercise of its law enforcement authority but also with its basic function of managing government programs. In some cases, *qui tam* actions challenge discretionary decisions made by Executive Branch officials and are essentially a means for a private citizen to try to im-

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[2] Some members of this Court have indicated that a court's power to reject a settlement reached by the government, without more, can be an unconstitutional infringement upon the Executive's authority to enforce the law. *See Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 156-57 (1967) (Stewart, J., dissenting).

pose his or her own view of how a government program should be managed.

For example, in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), the Court upheld the right of a former government lawyer to pursue a *qui tam* suit that, in essence, was an attempt to revive an internal debate that he had lost during his government service. While serving as an assistant district counsel for the Army Corps of Engineers, Hagood had refused to draft a contract because he interpreted federal law to preclude the proposed allocation of costs. He called his concerns to the attention of those higher in the chain of command, but both the contracting officer and the district counsel disagreed and overruled his objection. Another lawyer drafted the proposed contract, and the Assistant Secretary of the Army signed it. Six years later, after he retired from the Corps, Hagood brought a *qui tam* suit claiming the contractor's cost claims, which complied with the contract, were "false."

The *Hagood* case is not about fraud against the government, but about a challenge by a private citizen to programmatic decisions by duly authorized government officials. This kind of suit threatens the Executive's basic management capability by undermining the confidence of contracting parties in the Executive's ability to bind the United States. A party must be able to accept the commitment of Executive Branch officials without fear that a private citizen will one day bring a *qui tam* suit charging the party with fraud for adhering to the agreement it made with the Executive. Ultimately, the *qui tam* provisions allow private citizens to pursue a windfall by challenging, not representing, the government and its interests. That power is incompatible with the Executive Branch's constitutional authority.[8]

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[8] Congress's diminution of the Executive's law enforcement authority was deliberate; the legislative history of the 1986 amendments indicates that the expansion of *qui tam* suits was the product

B. The *Qui Tam* Provisions Violate the Appointments Clause

The Constitution explicitly restricts the power to appoint officials who will wield the Executive Power. Article II, § 2, cl. 2 provides that "Officers of the United States" must be appointed by the President, with the advice and consent of the Senate, except that "inferior Officers" also may be appointed by the Courts of Law or the Heads of Departments. Thus, if *qui tam* relators are acting as "Officers of the United States" in bringing lawsuits to enforce the False Claims Act, their authority unquestionably violates the Appointments Clause because they are self-appointed.

Buckley v. Valeo, supra, establishes that the *qui tam* provisions violate the Appointments Clause. This Court there explained that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" that Clause. 424 U.S. at 126. Emphasizing that conducting civil litigation to enforce the laws of the United States is a quintessentially Executive function (*id.* at 138-39), the Court concluded that the provisions "vesting in the [Federal Election] Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" were unconstitutional because "[s]uch functions may be discharged only by persons who are 'Officers of the United States.' " *Id.* at 140. That con-

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of Congressional dissatisfaction with the way the Executive had been exercising its enforcement discretion under the False Claims Act. *See* 131 Cong. Rec. 22,322 (1985) (Statement of Sen. Grassley) ("Government bureaucracy is . . . unwilling to guard against or aggressively punish fraud"); 132 Cong. Rec. 22,339 (1986) (Statement of Rep. Berman) ("the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud"); *see generally* S. Rep. No. 345, 99th Cong., 2d Sess. 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290-91.

clusion is fatal to the constitutionality of the *qui tam* provisions.

The court of appeals sought to avoid the impact of the Appointments Clause by asserting that the *qui tam* relator does not wield sufficiently "significant authority" over government litigation to qualify as an "Officer of the United States." Pet. App. 29a-31a. The court reasoned that "the Executive Branch retains 'sufficient control' of relators such that their exercise of authority to sue on behalf of the United States does not 'impermissibly undermine' executive functions." *Id.* at 29a.

This reasoning is flawed. Even if it were true that the Executive retains sufficient control of relators to prevent its executive functions from being "impermissibly undermined" (and we vigorously disagree), that would not negate the fact that *qui tam* relators do exercise "significant authority" over False Claims Act suits. The unfettered power to institute such suits and the ability to litigate them to a conclusion surely amounts to "significant authority." Indeed, this is precisely the level of authority that most troubled the Court in *Buckley*. The Court there stated that "[t]he Commission's enforcement power, *exemplified by its discretionary power to seek judicial relief*, is authority" that must rest in the Executive Branch. 424 U.S. at 138 (emphasis added). The Court in *Buckley* described the limitations on the activities of persons who are not government employees or duly appointed "Officers of the United States"; their duties must be "removed from the administration and enforcement of the public law." *Id.* at 139. The court of appeals does not explain how *qui tam* relators can possibly meet that standard.

The court of appeals also sought to distinguish *Buckley* on the ground that Congress had vested itself with the power to appoint members of the Federal Election Commission, whereas the *qui tam* statute does not

involve similar "concerns about congressional aggrandizement." Pet. App. 31a. But this Court made clear in *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991), that the restrictions of the Appointments Clause do not apply only when Congress seeks to accumulate additional power for itself. "The Appointments Clause not only guards against this encroachment [by Congress] but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 2638. The False Claims Act's open invitation to all citizens to appoint themselves government prosecutors runs afoul of the Appointments Clause just as surely as if Congress had arrogated that appointment power to itself.

II. THE COURT SHOULD GRANT CERTIORARI NOW TO RESOLVE THE UNCERTAINTY OVER THE CONSTITUTIONALITY OF THE *QUI TAM* PROVISIONS

It is important for this Court to act promptly to resolve the questions presented in this case. The issues are ripe and clearly framed for this Court; nothing is to be gained by encouraging further litigation in the lower courts. Further delay will serve only to multiply the harm caused by unjustified *qui tam* lawsuits.

A. The volume of *qui tam* litigation has exploded since the 1986 amendments to the False Claims Act. That growth is not caused by any change in the level of false claims made against the government; rather, it reflects a growing awareness by citizens, notably lawyers, of the possibility of obtaining a substantial recovery by suing government contractors in the name of the United States. Many plaintiffs are eager to take a chance at hitting the jackpot and are not dissuaded merely because the defendant has done nothing wrong. These claims unnecessarily burden the judicial system and strain the

resources of both the Executive Branch that must investigate them and the defendants who are unjustly accused.[4]

Congress will not act to stem the tide of these meritless suits; it is more likely to exacerbate the problem by expanding the availability of *qui tam* actions. Senator Grassley recently exhorted his colleagues that the remedy "can be used in whatever circumstances Congress deems appropriate . . . . The only boundary to its use is congressional imagination." 139 Cong. Rec. S875 (daily ed. Jan. 28, 1993). If the decision below is allowed to stand, Congress may be tempted to turn other Executive duties over to private bounty hunters—such as enforcement of the federal tax laws. Thus, prompt consideration of the issues presented here is needed to remind Congress that the Constitution is also a "boundary" to the use of *qui tam* provisions to divest the Executive Branch of its authority to enforce the laws.

B. Allowing the *qui tam* provisions to remain in force without resolving their constitutionality will cause substan-

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[4] The abuse of the *qui tam* provisions by relators was detailed in testimony before Congress given by then-Assistant Attorney General Gerson in 1992. He stated that many of these cases are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." *False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary*, 102d Cong., 1st Sess. 24 (1992) (Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice). The government declines to appear in most of the cases it investigates, and the recovery generated for the United States by *qui tam* relators in those cases has been minuscule—amounting to $225,000, or .0002% of the total fraud recoveries by the government. *Id.* at 25-26. The recent downturn in the defense industry is likely to trigger a further increase in such wasteful litigation; many *qui tam* relators are disgruntled former employees, and some of them try to buttress wrongful termination claims with insubstantial False Claims Act allegations. *See id.* at 28.

tial harm to innocent parties. The separation of powers doctrine violated by those provisions is not geared exclusively to defending the prerogatives of the individual branches of government. Rather, "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. at 2310.

Qui tam suits, even if they ultimately prove completely unmeritorious, severely prejudice defendants. The commencement of such a suit is a public accusation, *in the name of the United States*, that the defendant has been stealing public money. Regardless of the outcome of the suit, the defendant must suffer the damage to its reputation and character that results from such an accusation.[5]

Given these consequences, this Court has repeatedly recognized the importance of having an unbiased prosecutor who acts in the public interest. The government prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). " 'The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.' " *Young v. United States*

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[5] The adverse impact of such suits is exemplified by *United States ex rel. Denlinger v. Hughes Aircraft Co.*, No. SACV89-410 AHS (C.D. Cal.). Denlinger filed a *qui tam* suit against Hughes seeking *$9.6 billion*. Television stations prominently reported the suit and, complete with video backdrop of bodies floating in the Persian gulf, suggested that Hughes' alleged "fraud" had contributed to the mistaken shooting down by the United States of an Iranian airliner. In fact, the allegations were completely without merit, and the Department of Justice declined to appear in the case. Ultimately, the *qui tam* relator was sanctioned for discovery abuse and dropped the litigation.

ex rel. Vuitton et Fils, S.A. 481 U.S. 787, 803 (1987) (citation omitted).

In *Young*, this Court found that the constitutionally mandated level of impartiality could not be attained if a private party's counsel acts as prosecutor of the criminal contempt of the other party. The Court emphasized the dire consequences that attend a formal government accusation of misconduct, noting that "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Id.* at 814. Accordingly, this Court concluded that it was necessary to "have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice" —an assurance that is absent when a private party with its own motives acts as prosecutor. *Id.*

The same considerations apply with respect to civil enforcement. In connection with the imposition of civil penalties for violations of the Fair Labor Standards Act, the Court observed that 'the decision to enforce . . . may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980). Therefore, "a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50.

The *qui tam* provisions create precisely the kind of flawed prosecutorial decisionmaking that the Court disapproved in *Young* and *Jerrico*. The critical decision whether to institute an enforcement action—attended by severe practical consequences to the accused—is ceded entirely to private individuals who have no incentive or obligation to act in the public interest. Their decision is impelled by substantial monetary incentives to make an accusation, with no concern for justice in general or for

the specific ramifications to defendants or to government programs.

So long as the *qui tam* provisions remain in force, government contractors will continue to be denied their constitutional right to a prosecutor who acts in the interests of justice. They will continue to suffer unjustified public opprobrium as a result of meritless lawsuits brought in the name of the United States by individuals seeking personal gain. The Court should review the constitutionality of the *qui tam* provisions and restore the "liberty and security of the governed" that the Framers sought to protect through separation of powers. *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 111 S. Ct. at 2310.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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